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LABOR REFORMS 2015-2016 IN FRANCE: "MACRON" AND "REBSAMEN" LAWS, THE "EL KHOMRI" DRAFT LEGISLATION

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Abstract

The French government has recently focused on tackling the rigidities crippling the labor market in France, in order to stimulate growth. This has resulted in two major pieces of legislation, namely the "Macron" and "Rebsamen" Laws, which came into force during between summer 2015 and spring 2016. A new labor legislation commonly referred to as the "El Khomri" Law after the French Minister of Labor, Myriam El Khomri, has generated significant attention, strikes and protests in France over recent months. In this context, the aim of this paper is to analyze the most important points of these recent labor reforms on economic dismissals, working time, damages for unfair dismissal, etc.

El gobierno francés recientemente se ha centrado en atacar las rigideces existentes en el mercado laboral Frances, con el objetivo de estimular el crecimiento. Esto ha resultado en dos importantes reformas laborales, conocidas como Leyes "Macron" y "Rebsamen", que entraron en vigor entre el verano de 2015 y primavera 2016. Una nueva propuesta de reforma laboral, conocida como Ley "El Khomri" por la Ministra de Trabajo francesa Myriam El Khomri, ha generado una atención importante, huelgas y protestas en Francia en los últimos meses. En este contexto, el objetivo de este trabajo es analizar las cuestiones más importantes contenidas de estas recientes reformas laborales en el ordenamiento jurídico-laboral francés en materia de despidos colectivos, tiempo de trabajo, compensación por despido injustificado, etc.

Título: Reformas laborales 2015-2016 en Francia: Leyes "Macron" y "Rebsamen" y la propuesta legislativa "El Khomri"

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Summary

1. Introduction

The French government has recently focused on tackling the rigidities crippling the labor market in France, in order to stimulate growth. This has resulted in two major pieces of legislation, namely the "Macron" and "Rebsamen" Laws, which came into force during summer 2015.

A new labor legislation commonly referred to as the "El Khomri" Law after the French Minister of Labor, Myriam El Khomri, has generated significant attention, strikes and protests in France over recent months. The draft law containing various employer-friendly measures –relating in particular to damages for unfair dismissal, grounds to justify economic dismissals (redundancies) and flexible working time arrangements in companies not covered by a collective agreement– has met stiff opposition from trade unions.

2. The 2015 changes

Passed during the torpor of the summer months, Act 2015-990, August 6, 2015 (informally known as the "Macron" Law), and Act 2015-994 of the following August 17 (informally known as the "Rebsamen" Law) have introduced some real changes to French labor law

2.1. The "Macron" Law

French Law 2015-990 for economic growth and activity, known as the "*Macron Law*"[1] entered into force August 6, 2015. The Macron Law targets myriad sectors of the French economy that are bound up by special rules. For example, legal professionals such as bailiffs and notaries will have a freer hand in choosing where they want to set up business. Bus lines will be able to operate along routes that compete with state-owned railways. The "Macron" Law introduces some major innovations to French competition law. The main legal changes include revisions to certain procedures before the French Competition Authority, (the "*Autorité de la concurrence*", the "*FCA*") such as the French settlement procedure and national merger control procedures. The "Macron" Law also provides procedural changes in the FCA's enforcement powers and includes specific measures in the retail sector.

[1] Law 2015-990 of 6 August 2015 "*pour la croissance, l'activité et l'égalité des chances économiques*"

a. Sunday Work

Only very few French shops, primarily in tourist areas, are currently open on Sundays. Under the "Macron" Law, shopping areas (*zones commerciales*), touristic areas and international touristic areas would be established with the right to remain open on Sundays and evenings until midnight.

- International tourist zones (article L. 3132-24 of the Code du travail): these are zones which, given their international reputation, are visited by exceptionally high numbers of high-spending foreign tourists. They will be defined by Decree and be located in Paris, Cannes, Nice and Deauville.
- Tourist zones (article L. 3132-25 of the Code du travail): these are zones visited by particularly high numbers of tourists.
- Commercial zones (article L. 3132-25-1 of the Code du travail): these follow from PUCE and are characterized by a particularly high potential of supply and demand, taking into account, as the case may be, of a cross-border zone in the immediate vicinity.

Certain stations must be added to this list (article L. 3132-25-5 of the Code du travail) if they are not already included in one of the three atypical zones. There are twelve stations in total. Retailers operating within these areas would automatically be entitled to remain open on Sundays –subject, however, to the existence of a collective agreement under which concerned workers will be compensated, and subject to Sunday work being strictly voluntary. The legislation also amends regulations governing Mayor's Sundays (article L. 3132-26 of the Code du travail). Their initial number of maximum five will increase to 12. Previously, the mayor had to obtain the consent of the Public Intercommunal Co-operation Establishments (EPCI) if more than five Mayor's Sundays were planned.

b. Economic dismissals: clarifications and changes

As part of the employer's obligation to seek reclassification for the employees to be dismissed, the employer was required to send a reclassification questionnaire asking the employees if they were interested in accepting a reclassification position outside France. Under the "Macron" Law, and upon publication of a Decree, the obligation to seek reclassification position abroad will only apply to employees expressly requesting to receive such reclassification proposals.

In case of dismissal of at least 10 employees within a period of 30 days (requiring the implementation of a job saving scheme or "*Plan de sauvegarde de l'emploi*"), employers will be able to apply unilaterally the selection criteria for dismissals in a perimeter smaller

than the company, provided that such perimeter is no smaller than each "employment area" within which the company's establishments are located.

c. New rules to maintain jobs agreements

In case of serious economic difficulties, since 2013, employers are allowed to conclude a fixed-term collective agreement under which they undertake to maintain the level of employment in the company during a certain period of time in consideration of changes in the work organization (e.g. reduction in salaries or increase in working time). Such agreements may now be concluded for a period of 5 years instead of the previous 2 years, and in case of dismissal of an employee refusing to be subject to such agreement, the employer will be exempted from the obligation to seek reclassification positions for such employee.

d. Changes to employees' shareholding

The "Macron" Law implemented major changes for free shares. The vesting period is now reduced and the retention period is made optional. Moreover, the employer's specific contributions will be reduced to 20% of the value of the shares at vesting date (instead of 30%), and the obligation to make such contribution will be eliminated for certain small and medium-sized companies. The employee's specific contribution will simply disappear.

e. Modifications to employees' saving schemes

The "Macron" Law aims at facilitating the implementation and the ease of comprehension of employees' saving schemes. In this respect, the time limits for the payment of compulsory profit sharing ("*participation*") and voluntary profit sharing ("*intéressement*") entitlements are realigned, and the implementation of pension saving scheme ("*PERCO*") is facilitated. Social Security contributions applicable to these schemes are reduced if certain conditions are fulfilled. The use and management of such scheme are also rendered more flexible, and the information available to the employees with regard to the various saving plans applicable within the company is improved.

f. A new procedure before labor courts

The employment tribunal system has been reformed. The conciliation bureau –renamed conciliation and guidance bureau– now also decides when cases are ready for trial and can even adjudicate them if a party fails to appear. In the absence of conciliation, the case will be sent to the judgment bureau, sitting either (i) in its standard panel formation as

previously (4 lay-judges); (ii) in its restricted panel formation (2 lay-judges) with the agreement of the parties, provided the claim involves a dismissal or seeks court-ordered rescission (in which case the lay-judges will have 3 months in which to enter their decision); or (iii) in its special panel formation (presided by a professional judge) in case of a split vote at the request of the parties or *ex motu proprio*. Furthermore, new alternative dispute resolution procedures are now rendered accessible to employees and employers.

However, the principle of a maximum amount of damages to be granted by a court for unfair dismissal has partly been declared unconstitutional (for the part of the amount which depended on the company's size) and will not enter into force. The government will propose a new law in this regard.

g. Additional controls regarding secondment of employees to France

Any entity established abroad and seconding employees to France will be required to provide to the labor authorities a number of documents translated into French, evidencing compliance with secondment rules. Moreover, the secondment declarations, which must be filed with the French authorities, will need to be made online.

The French client also needs to obtain a copy of the secondment declaration filed by the foreign service provider to French authorities. If such document is not obtained, the French client will need to file a specific declaration to the labor authority within 48 hours form the start of the secondment.

Finally, the administrative sanction applicable in case of breach of certain of the secondment rules is raised to a maximum of 500,000€, and the labor authorities can order the temporary suspension of the provision of services in the event of breach of certain essential secondment rules.

h. Information of employees in the context of a transfer of business/shares

A law published on July 31st, 2014 requires small and medium-sized companies to inform each employee individually before a sale of a business or a transfer of the majority of a company's shares.

One of the most controversial parts of such legislation was the fact that breach of this requirement could trigger the nullity of the sale or transfer. The "Macron" Law provides that such sanction will be removed, and replaced by a specific financial penalty of up to

2% of the sale or transfer price (subject to the publication of a Decree by February 6th, 2016).

It should be recalled that in the meantime, the Constitutional Court has declared unconstitutional the sanction of nullity applicable in the case of transfer of shares. However, it cannot be interpreted from such decision that the nullity of the transaction cannot be triggered in the case of sale of a business.

i. Changes to the sanctions applicable to hindrance offence

In cases of hindrance to the employees' representatives rights, the employer was liable to a penalty of up to 3.750€ and a jail sentence of up to 1 year. The "Macron" Law modifies such sanctions, and provides that in case of hindrance to the functioning of the employees' representatives, the employer will only be liable to a fine of up to 7.500€. However, in case of hindrance to the elections/appointment of the employees' representatives, the jail sentence will still be applicable, together with a maximum fine of 7.500€.

2.2. Main changes resulting from the "Rebsamen" Law

Doubtless the most important contribution made by this law concerns the possibility to combine employee representative bodies. Companies with a headcount of less than 300 employees (instead of the previous 200) will be able to set up a single common representative body (French acronym DUP or *délégation unique de personnel)* merging the Works Council and the staff delegates (which was already possible), as well as the health, hygiene and safety committee (French acronym CHSCT). This single common representative body will be set up in the different establishments of the company, as applicable. At least 4 to 6 annual meetings will have to be held on matters falling within the ambit of the health, hygiene and safety committee. In companies with a headcount of 300 employees or more, it will be possible, pursuant to a collective agreement adopted by majority vote, to combine these three, or two out of these three bodies, in a single body. Even in the absence of a single common representative body, the employer may organize common meetings on cross-cutting topics.

Since January 1st, 2016, the periodic annual information and consultation meetings of the Works Council will be combined (3 instead of 17), as well as the mandatory negotiations with trade unions (3 instead of 12). In addition, the employer will no longer be required to consult the Works Council before entering into, revising or terminating collective agreements. Employers must now have 300 employees instead of the previous 150 on their payroll in order to be required to meet with the Works Council at least once a month.

So as to facilitate the conclusion of collective agreements in the absence of trade union delegates, the law allows companies to negotiate with elected representatives of representative trade union organizations, any agreement between them being subject to approval by the majority of the employees. Previously, this possibility was only available if the following three-pronged condition were met: (i) the company had a headcount of less than 200 employees; (ii) the only agreements that could be concerned were agreements that by law could only be implemented pursuant to a collective agreement; and (iii) such agreement was validated by a joint branch committee (the last two prongs continue to apply if the elected representatives do not hold a mandate from a representative trade union). Also, in the absence of an elected representative (or if no elected representative wishes to negotiate), a collective agreement can be negotiated and entered into several areas, by one or more employees holding a mandate from representative trade unions, in companies with less than 11 employees, having to approve such agreement by a majority of the employees.

While today, an employer contemplating dismantling the Works Council (as a result of a lasting reduction in payroll) is required to obtain the unanimous agreement of the trade unions or authorization by the authorities, he/she may now do so unilaterally (following a period of 24 months with a headcount of less than 50 employees).

As of July 1st, 2017, regional inter-professional joint committees will be set up in charge of promoting dialogue between employees and employers with a headcount of less than 11 –at least in branches where no analogous bodies exist.

To capitalize on trade union experience, the law guarantees employee representatives, whose paid time off to perform their representative duties exceeds 30% of their working time, to benefit, during the course of their term(s), of an office and salary increases at least equal to general pay raises and the average individual pay raises received, applicable to employees in the same professional category with comparable seniority. Also, employers are required to meet with employee representatives once upon their taking up office (to discuss the practical arrangements for the performance of their duties) and again at the end of their term of office (so as to capitalize on the experience acquired, for representatives whose delegation hours represent 30% or more of their working time).

So as to promote parity, the law requires, as of January 1st, 2017, a balance between men and women on the list of candidates for professional elections (these elections can be cancelled otherwise). The same objective is to be pursued for salaried directors and lay-judges in employment tribunals. The law also prohibits "*sexist conduct*".

In case of a work-related accident or occupational illness, the employer will be dispensed from looking for other placement possibilities if the occupational health doctor expressly indicates that in his/her opinion keeping the employee on in the company would be seriously prejudicial to his or her health (the indication "*unfit for any work*" would not seem to suffice). In addition, mental disorders such as professional burn-outs are recognized as occupational illnesses.

3. The 2016 "El Khomri" draft Law

A new labor legislation commonly referred to as the "El Khomri" Law after the French Minister of Labor, Myriam El Khomri, has generated significant attention, strikes and protests in France over recent months. The draft law containing various employer-friendly measures –relating in particular to damages for unfair dismissal, grounds to justify economic dismissals (redundancies) and flexible working time arrangements in companies not covered by a collective agreement– has met stiff opposition from trade unions.

3.1. Legislative procedure

The draft law was introduced in the National Assembly on March 24. The government has chosen to have these measures adopted without a vote in the Natinoal Assembly. Article 49-3 allows a government to impose a law on the Assembly if the Assembly does not bring down the government in the ensuing 48 hours through a motion of no confidence. The decision to bypass a vote and ram the measure through with a rarely used executive power. Discussions at the Senate began May 13 and ended June 25. So the adoption of the bill by the National Assembly will be possible in the summer.

On July 5th 2016 the Government again resort to 49-3 for the adoption without vote on the second reading of the law Job defended by Myriam El Khomri. The text has not completed his journey, since there will be a shuttle with the Senate before final adoption by end of July or August by the National Assembly.

3.2. The original proposals

The original proposals included the following measures before the National Assembly:

- A cap on damages for unfair dismissals (with a scale running from three to 15 months' pay depending on length of service). Currently, no cap is set (though a statutory minimum award equal to six months' pay applies where the employee has at least two years' service, unless the company has fewer than 11 employees).

- A change of the geographic scope applicable for purposes of assessing whether a company has valid economic grounds for dismissing staff. Currently, French case law provides that labor courts must look at the worldwide economic situation of the group to which the employing entity belongs (or at least that of the worldwide business division/segment to which it belongs). This means that economic dismissals in a French subsidiary that has repeatedly suffered heavy losses could be considered unfair (and give rise to an award of damages) if the group to which the subsidiary belongs to is profitable as a whole. Under the "El Khomri" Law, French judges would instead only look at the economic situation of the company/group in France.

- The draft legislation was intended to give employers greater room to negotiate derogations from statutory rules with their union delegates at company level, and to encourage inbound investment in France.

On March 14 the government presented significant changes to the proposals. Some measures have effectively been abandoned. In particular, there will be no cap on damages for unfair dismissal; instead, a range of numbers of months' pay depending on length of service will be provided for guidance only. This was already envisaged by the "Macron" Law adopted in August 2015, but has not been implemented yet as it was overtaken by the "El Khomri" proposals.

3.3. The bill before the Senate

a. Indicative scale of labor court damages

In its previous version, the Bill provided for a cap on labor court damage awards (excluding "PSE" job protection plans) if the dismissal was considered as deprived of any genuine and serious cause. The cap has been eliminated. On the other hand, the bill still provides for an indicative scale of damages, derived from the "Macron" Law (no. 2015-990) of August 6, 2015 for growth, business and equal economic opportunity.

The criticism of the scale initially contemplated in the "Labor Bill" –that the legislator should instead favor the application of a deduction at source on businesses contemplating a legally questionable dismissal– will therefore be silenced. The scale should be set out in a future decree.

b. Scope of assessment of economic difficulties

The scope of the assessment of the company's economic difficulties will be the company itself and not the group, including if the company belongs to a group. Nonetheless, the

courts will have the power to verify whether the company's economic difficulties were created "artificially" in order to justify job cuts. The list of a non-exhaustive economic causes is confirmed.

c. The generalization of majority agreements

The validity of a company agreement is, in principle, subject to its signature by one or more trade unions representing employees who have received at least 30% of the votes in the first round of the last elections, and the absence of opposition of one or more trade unions representing employees who received the majority of votes in the same elections (article L. 2232-12 of the Labor Code). According to the Bill, company agreements must be signed by one or more trade unions representing employees who receive more than 50% of the votes.

The principle of primacy of the company agreement on the industry-wide agreement on working time is extended. This aspect of the law is the reform that most infuriates the labor unions, as it allows individual companies to negotiate agreements over such issues as hours worked, paid holidays and bonuses that are less favorable to workers than those negotiated at the occupational sector level.

d. The «right to disconnect»

The development of information and communication technologies, if badly managed or regulated, can have an impact on the health of workers. Article 25 in a chapter titled "The Adaptation of Work Rights to the Digital Era" states: "[a]*mong them, the burden of work and the informational overburden, the blurring of the borders between private life and professional life, are risks associated with the usage of digital technology*." The law suggests that companies negotiate formal policies to limit the encroachment of work into people's homes (or bingo halls or salsa clubs or wherever it is they find themselves when they are away from the office).

4. References

Regarding the recent French labor law, it is highly recommended to read the following references:

- On the "Rebsamen" Law

M. MORAND, "La négociation avec les élus dans la loi Rebsamen », *Revue de jurisprudence sociale (RJS)* 2016 p. 497

- On the “El Khomri” draft Law

A. SAURET, “Durée du travail: les propositions du projet de loi El Khomri révolutionnent peu”, *La Gazette du Palais*, 2016, n° 22, p. 53.

F. FAVENNEC-HÉRY, “Halte au déclinologues”, *JCP S*, 2016, n° 7, p. 3.

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